Ford Motor Company *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO. Cases 7–CA–34191 and 7–RC–19940

November 16, 1994

DECISION, ORDER, AND DIRECTION OF SECOND ELECTON

BY CHAIRMAN GOULD AND MEMBERS DEVANEY AND COHEN

On March 23, 1994, Administrative Law Judge Arline Pacht issued the attached decision. The Union filed an exception and supporting brief, and the Respondent filed cross-exceptions, a supporting brief, and an answering brief to the Union's exception.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

[1] The Respondent has excepted to some of the judge's credibility resolutions. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's finding that the Respondent's no-distribution/no-solicitation rule was overly broad, we place no reliance on her citation to *Soltech, Inc*., 306 NLRB 269 (1992), which dealt with distribution of literature. Instead, we rely on *Brunswick Corp*., 282 NLRB 794 (1987), in finding that the Respondent may not preclude the protected activity of union solicitation in working areas during nonworking time. We also stress that, in addition to the factors the judge relied on, the Respondent's unlawful no-distribution/no-solicitation rule constitutes a basis for setting aside the election in Case 7–RC–19940 because the rule impinged on the unit employees' ability to communicate on matters relating to the organizing campaign.

We also adopt the judge's finding that the Respondent did not act unlawfully in converting some of its supplemental employees to full-time status during the election campaign. This finding is supported by uncontroverted testimony by Ronald Bowersock, the Respondent's engine laboratories manager, that the Respondent began the conversion process in June 1992, which was over a month before the organizing campaign started later that summer. Thus, we do not find that the Respondent initiated this change in employment conditions in order to dissipate support for the Union. We disregard, however, the judge's finding that the filing of the representation petition on November 23, 1992, was the critical date for considering this issue. In the context of an unfair labor practice case, the Board examines whether the respondent's conduct interfered with employees' organizational rights without regard to whether the union had obtained the requisite showing of interest to file a representation petition.

Finally, in adopting the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by verbally warning employee Robert Brace about taking a lengthy lunchbreak, we rely on Brace's credited testimony that his immediate supervisor, Stan Harrison, told him after the incident that ''it is only chicken shit and all this stuff will stop after the union stuff stops.'' We note that, contrary to the judge's findings, the Respondent gave two other employees similar warnings *before* bringing this matter to Brace's attention and that the two supervisors who did so had direct authority over Brace at the time because they were substituting for Harrison. Nevertheless, we find that correction of the judge's misstatements does not affect our ultimate finding of a violation here because Harrison's statement effectively admits that the warning was attributable to the ongoing union activity.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Ford Motor Company, Dearborn, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that the election held January 22, 1993, in Case 7–RC–19940, is set aside and that this case is severed and remanded to the Regional Director for Region 7 for the purpose of conducting a new election.

[Direction of Second Election omitted from publication.]

John Ciaramitaro, Esq., for the General Counsel.
Nancy Schott, Esq., of Dearborn, Michigan, for the Respondent.
Betsey A. Engel, Esq., of Detroit, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge. Pursuant to a petition filed on November 23, 1992, by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO (the Union or UAW) a secret-ballot election was conducted among the employees at Respondent Ford Motor Company's Dynomometer facility on January 22, 1993. On January 29, 1993, the Union filed objections to conduct affecting the results of the election, and on February 4, 1993, charged Ford with committing various unfair labor practices in violation of the National Labor Relations Act (the Act). Thereafter, on March 31, 1993, a report on objections and order consolidating complaint and objections issued on March 31, 1993, alleging that the Respondent, Ford Motor Company, committed multiple violations of Section 8(a)(1) and (3) of the Act. The Respondent filed a timely answer on April 8, 1993.

A hearing in this matter was held before me in Detroit, Michigan, on October 20 and 21, 1993, at which time the parties had full opportunity to examine and cross-examine witnesses, present real proof, and argue orally. During the hearing, the UAW withdrew Objection 5, the only one for which there was no parallel unfair labor practice.

On the basis of the entire record,[1] posttrial briefs submitted by the General Counsel and the Respondent, and on my observation of the witnesses' demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTIONAL FINDINGS

Respondent, a corporation with an office and place of business in Dearborn, Michigan, has maintained facilities in various States, where it is engaged in the manufacture and sale of automobiles, trucks, and related projects. At its Dynamometer building located in Dearborn, Michigan (the Dyno facility), the only site involved in this proceeding, engines, engine-transmission combinations, and engine components are tested for durability, compliance with emission standards, and other criteria.

During the year ending December 31, 1992, in the course and conduct of its business described above, Respondent derived gross revenues in excess of $500,000. During the same period, Respondent sold and shipped from its Michigan facilities products, goods, and materials valued in excess of $50,000 directly to points located outside the State of Michigan. The complaint alleges, Respondent admits, and I find that the Ford Motor Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times, the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The unlawful conduct about which the UAW complains allegedly occurred during its campaign to organize the employees of Respondent's Dyno facility. The pleadings pose the following questions:

(1) Whether Respondent maintained an overly broad no-solicitation rule and enforced it in a disparate manner.

(2) Whether Respondent's supervisors unlawfully threatened employees with a loss of benefits in the event the Union prevailed.

(3) Whether Respondent's supervisors discriminatorily harassed an employee about the length of his lunchbreak because he was a union activist.

(4) Whether Respondent converted supplementary employees to permanent status to influence them to withhold support for the Union.

A. *Respondent's No-Solicitation/No-Distribution Rule*

1. The facts

The Union began its representation drive in the summer of 1992.[2] During the campaign, a number of the 329 employees in the petitioned-for unit openly discussed the Union and wore hats, buttons, and other paraphernalia demonstrating their prounion or antiunion stance. Literature both advocating and opposing the Union was widely distributed and posted on various bulletin boards. The campaign culminated in an election on January 22, 1993, which the UAW lost by a vote of 127 to 186.

The General Counsel contends that the no-solicitation rule in effect at the Dyno plant for many years is overly broad and was enforced in a selective and disparate manner during the UAW organizing campaign. The rule provides, in pertinent part that:

> No employee of the Ford Motor Company may distribute literature or solicit on Company property for any purpose without the permission of his or her supervisor or department manager. An employee, however, need not obtain permission in order, during the non-working time (including break periods and meal time) of both the soliciting employee and the employee being solicited, to engage in solicitation that is legally protected in non-working areas with respect to union membership or support or to distribute literature that is legally protected in non-working areas with respect to union membership or support. Permission to solicit for expressions of friendship and good will for a fellow employee who is retiring, ill or bereaved is the type of permission that supervisors or department managers are authorized to grant. [G.C. Exh. 11.]

2. The rule was overly broad

As a general rule, an employer may not prohibit solicitation by employees during their nonworking time, nor proscribe the distribution of union literature on nonworking time in nonworking areas. On applying these standards to the Respondent's rule, it is clear that it imposes limitations which are both overly broad and ambiguous.

It is axiomatic that an employer may proscribe solicitation only during the employees' working time. Distribution of union literature poses different problems and therefore may be limited to nonworking hours and nonworking areas of a facility. Under these standards, the rule in place at the Dyno plant suffers from several defects. First, the rule appropriately provides that employees may engage in union solicitation during their nonworking time. However, the rule goes further—it also confines such solicitation to nonworking areas. This is presumptively unlawful.[3] See *Soltech, Inc*., 306 NLRB 269 (1992).

Further, the rule requires that employees may engage in solicitation and distribution only as to matters that are ''legally protected.'' Employees should not be put to the risk of knowing what is or is not legally protected. This phrase is unnecessarily ambiguous and, therefore, could restrain employees in the exercise of Section 7 rights. See *Westinghouse Electric Corp*., 240 NLRB 905 (1979), affd. 612 F.2d 1072 (8th Cir. 1979).

[1] Documents introduced into evidence by the counsel for the General Counsel (General Counsel) will be cited as G.C. Exh. followed by the appropriate page number; references to the Respondent's exhibits will be cited as R. Exh., while the Charging Party's exhibits will be designated C.P. Exh. References to the transcript will be denoted Tr.

[2] Unless otherwise noted, all events took place in 1992.

[3] The General Counsel submits that Respondent's rule impermissibly requires employees to secure supervisory consent before soliciting or distributing literature. A careful reading of the rule's second sentence, however, cures this problem, making it clear that such consent is not a prerequisite where union material is concerned.

3. The no-solicitation/no-distribution rule was disparately enforced

Respondent's no-solicitation/no-distribution rule was not only unlawful on its face, on several occasions, it also was enforced in a discriminatory manner. The Government's evidence that this rule was implemented in a disparate manner rests on the testimony of two employees. Anna Stebbins, for one, testified that in August, while she was talking with Supervisor Jerry Peck, a passing employee made a disparaging remark about the Union. According to Stebbins, the comment led Peck to warn her: ''I don't want you talking about the fucking union in my wing on company time any more. You are upsetting my people.'' (Tr. 83.)

Peck denied making any such statement. However, he did recall a different incident which occurred in September when he observed Stebbins talking to fellow technicians in the hall outside their work area as they were returning from lunch. Peck claimed that he did not intrude at that time. Instead, at the end of the shift, he spoke to Stebbins privately at her station and cautioned her to confine such conversations to nonwork areas such as the picnic table outside the facility, the lunchroom, or the coffeebreak area. Peck acknowledged that he did not customarily prevent employees from talking about nonwork-related matters while at work.

It is unnecessary to decide whether Peck used the precise words attributed to him by Stebbins, for what he admits to having said is bad enough. By Peck's own admission, Stebbins was not engaged in prounion conversation during working time or in a working area. Accordingly, she was in compliance with Respondent's rule causing Peck's subsequent instruction to engage in such speech outside the workplace to be unlawful. Moreover, since Peck did not prevent employees from talking about collateral matters while on the job, he was not entitled to impose a different code of conduct on Stebbins without running afoul of the duty to treat all employees equally. Hence, by insisting that Stebbins refrain from talking about the Union while at work, Peck plainly treated her in a disparate manner.

A second employee, Roger Connolly, testified that some time in September, Supervisor Lee Mondro directed him to remove a union button from the lapel of his lab coat. Connolly asked Mondro if he was joking, but in fact, did remove the button. He maintained that he did not wear the pin again until the Union filed an election petitition on November 23.

Mondro gave a different slant to this episode. He stated that he spoke with Connolly about his attendance record on a number of occasions which began months before the inception of the union campaign. On one occasion, as he was passing Connolly in the hall, Mondro, indirectly referring to Connolly's attendance record, asked facetiously if he didn't have enough problems without wearing a union button. Connolly then refastened the botton inside his lab coat lapel and in a jocular manner, asked Mondro if that looked better. Mondro further claimed that he observed Connolly wearing the union button soon after their encounter and that he continued to do so throughout the organizing campaign. In addition, a number of Respondent's witnesses testified without contradiction that many employees wore buttons and other items throughout the campaign identifying them as union proponents.

With a number of Dyno employees regularly and without incident sporting UAW buttons and other paraphernalia, it makes little sense that Mondro would seriously command Connolly to remove his. The problem is not that Mondro violated the Act by directing Connolly to remove the union button. Rather, the gravamen of the harm is that Mundro implicitly suggested that by merely wearing a union insignia, Connolly was compounding a problem he already had with his attendance. Although Mondro may have intended his remark to be lighthearted, he implied that wearing a union button meant trouble to the wearer.

By suggesting to employee Roger Connolly that wearing a union button compounded a problem he already had on the job because of his poor attendance record, Supervisor Mondro implied that Connolly's overt support of the Union would not serve him well, and could even affect his employment status. Remarks like Mondro's, which may be made in jest, nevertheless convey a veiled threat and violate the Act.

B. *Unlawful Interference with the Distribution and Posting of Union Literature*

1. Distribution

The complaint further alleges that the Respondent interfered with employees' efforts to distribute and post union materials. In support of this allegation, employee Robert Brace testified that during his lunch period, he distributed union literature to coworkers while they were having lunch at tables in control rooms outside individual testing cells. The key question here does not concern what Brace was doing, but where he was doing it. The parties' positions on this matter turn on whether certain sections of the facility were working areas even during the times that employees took their lunch there.

To understand this dispute, it is necessary to describe the layout of the workplace and the different uses to which the rooms were put. Respondent's Exhibit 2, a master plan of the Dyno Lab, shows that the facility had four major wings, each extending at a right angle from a main corridor the length of three football fields. Each wing contained a number of enclosed chambers called testing cells where the tests on engine parts were conducted. Between every two cells was a ''control room'' with an interior glass window to permit the employee-technicians seated at consoles adjacent to the window, to see into the cell and monitor the tests. In the center of each control room was a rectangular table where employees stationed in that area frequently ate lunch. The employees also could eat in a cafeteria which at the time was in a windowless basement room of the building. Moreover, the cafeteria was not open during the late afternoon to evening shift. There also was a separate place where employees could get coffee, but it was not outfitted with tables or chairs.

It is undisputed that Brace distributed union material during his lunch period to employees whom he said also were eating lunch at the tables in the control rooms. The Respondent takes the position that these rooms are working areas regardless of what the employees may be doing. Further, Respondent maintains that even though employees may be on their lunchbreak, they also may be monitoring ongoing tests. Thus, Respondent insists that the entire control room is a working area off limits for solicitation and distribution purposes, whether or not employees are on a lunchbreak. How-

ever, there is no evidence that the employees were told they could not take their lunch in the control rooms or that they could only eat lunch there when they were monitoring tests.

Brace testified that on one occasion in late November, Supervisor Steven Norris followed him from one control room to another while he distributed union materials during his lunch hour. As he continued his rounds, Brace observed Norris enter the supervisors' office and loudly announce that Brace, was distributing union literature which ''we had to stop . . . now.'' (Tr. 29.)

While Norris admitted following Brace and entering the supervisors' office to tell them about what he assumed was the wrongful distribution of union materials, he denied having said anything about stopping him. It is not necessary to decide exactly what words Norris used; for the point is that he acknowledged asserting that Brace should not be distributing union materials in control rooms. Norris apparently assumed that any area which served principally as a workspace was a working area and that anytime an employee was in that area, he was on working time within the purview of the Respondent's no-solicitation/no-distribution rule. In other words, he made no distinction in the room's purpose when it was being used by employees as their luncheon area. Although Norris indicated that employees could be running tests and eating at the same time, he did not state that this was, in fact, the case, when he observed Brace approaching them.

After Norris left him, Brace moved on to another wing of the facility where he passed out material to some employees who were eating. Brace's supervisor, Stan Harrison, found him and directed him to his office, where he told him he was not to distribute union literature. Brace asked to see a written directive to that effect. A week later Harrison gave him a written copy of the Company's no-distribution/no-solicitation rule as well as a memo entitled ''What An Employee May Do'' which instructed supervisors in pertinent part that:

> Employees are permitted:
>
> To discuss union matters during non-working hours. For this purpose, non-working hours refer to the time during which the employees are relieved of any responsibility to perform work. A lunch period, rest period or periods before and after working hours would constitute non-working hours.
>
> To wear union buttons any time.
>
> To attend union meetings during non-working hours and off Company property. [R. Exh. 1.]

Brace stated that following Harrison's admonition, he refrained from distributing campaign material in the control rooms, although he continued to do so in other areas of the facility.

On another occasion, Harrison asked Brace to remove union materials from an exposed position on the table top to an almost equally exposed position on top of his toolbox. Brace further testified that some time after receiving the memo from Harrison, another supervisor, Devriendt, told him he could not leave union literature in the coffee room. According to Brace, when he told Devriendt that Harrison has given him a memo which indicated he could leave such materials there, the supervisor snapped that he didn't care ''what you have from Stan, we were told that's not supposed to be there.'' (Tr. 37.) However, Devriendt left the material in place. Although Devriendt denies that such an incident occurred, I am inclined to credit Brace's account for he had a sharp and specific recollection of an encounter one is not likely to invent or forget.

2. Conclusions; improper limitations on lunchtime distribution

There is no dispute that while he was on his lunchbreak, Robert Brace distributed union literature to fellow employees who evidently also were on break, since the were at tables centered in their respective control rooms eating their meals. The dispute arises because the General Counsel posits that while the employees were taking their lunchbreak, they were on nonworking time and temporarily in nonworking space, whereas the Respondent contends that the control rooms remained worksites regardless of their periodic use as luncheon areas.

A similar situation was presented in *Oak Apparel*, 218 NLRB 701 (1975). In that case, the employer had not designated a specific place where employees were supposed to have lunch. As a result, some employees took meals at their machines, while others continued to work. The Board concluded in *Oak Apparel* that supervisors who prohibited the distribution of union literature during the lunch period violated Section 8(a)(1) because at the time of the distribution, the work area was being used as a lunchroom.

The *Oak Apparel* precedent is persuasive here. The record is sufficiently clear that when Supervisor Norris complained that Brace was distributing union literature to employees in the control rooms, the employees were not working, for they were seated at tables in the center of the room rather than at their monitoring stations. The evidence is even clearer that Harrison interrupted Brace when he was distributing union material to coworkers who were eating lunch. As in *Oak Apparel*, supra at 701–702, ''the work area was being used principally as a lunchroom at the time.'' Consequently, Respondent's efforts to restrict Brace's organizational rights during nonwork time in a nonwork area of the facility unreasonably interfered with the employees' right to self-organization in violation of the Act. Id. There is even less question that Supervisor Devriendt acted improperly in instructing Brace that he could not leave union literature in a coffee room, which was evidently a nonworking space.

3. Respondent's posting practices were discriminatory

Considerable contradictory evidence was adduced regarding the appropriate use of 11 bulletin boards in the facility. The Respondent produced a diagram and had witnesses describe the location of each such board. However, conflicting testimony was offered about the uses of the various boards; that is, whether they were used exclusively for Respondent's business purposes or were available for employee postings, including information both positive and negative about the Union. The manner and extent to which management notified the workers about limitations on the use of ''Company'' boards also left much to be desired. Based on a synthesis of testimony from all the witnesses who addressed this question, I conclude that Respondent had no formal, written policy, that prior to the union campaign, the postings on various bulletin boards was a matter of custom, and that only after the

Union began its organizational drive, did several supervisors orally advise employees on their shifts that 7 of the 11 boards were dedicated to the Company's use.

It is undisputed that no written policy was in place defining the various boards' purposes. Further, while a few bulletin boards had signs affixed to them specifying that they were for ''employee involvement,'' nothing else indicated which ones were available or off-limits for employee postings prior to the onset of the Union's campaign. Instead, various supervisors testified that they gave oral notice to employees in their units sometime in mid-November as to appropriate bulletin board use. Notwithstanding their verbal instructions, prounion and antiunion literature continued to appear on bulletin boards, which supervisors removed on the grounds that the boards involved were dedicated to company purposes.

For example, Brace testified that just before the Christmas break, he observed Supervisors Tom Matson and Harrison remove union literature from what he had assumed was a community bulletin board, and then throw it away in the presence of small groups of employees. While that particular board was used for posting employees' hours and overtime rules, on previous occasions, Brace had observed employees placing notices there for sale items. More typically, sale notices were posted on a community bulletin board in the main corridor while the bulletin board to which Brace referred was used more frequently for posting sympathy cards, thank-you notes, and the like, in addition to shop announcements. Brace testified that prior to this date, no rules had been promulgated regarding the use of various bulletin boards. Yet, when Brace asked Harrison why he had torn down the union material, the supervisor replied that it was a company board. Brace then asked him if there could be an employee bulletin board to which Harrison replied that they could talk about it ''after this union stuff is over.'' (Tr. 43.)

Supervisor Leon Asselin acknowledged removing items, both prounion and antiunion, from various locations, which he claimed were not authorized for employee use. After removing one such notice, he circulated a memo dated January 20, 1993, stating that a certain board which had been used for posting a union flyer was ''not intended for posting of any information.''(R. Exh. 3.) Even after issuing this memo, Asselin found and removed material both favorable to and critical of the Union on ''Company'' boards. Apart from his January 20 memo, Asselin admitted that the first and only time he told the employees on his shift that one of the bulletin boards was committed to company purposes was in mid-November.

Similarly, Machine Shop Supervisors Matson and Harrison did not advise the employees on their shifts that the bulletin board in the shop was not to be used for nonwork-related matters until the onset of the union campaign in mid-November. Even after their announcements, both men allowed personal notices like sympathy cards to remain on the board but removed prounion and antiunion literature. The institution of a new policy with respect to bulletin board postings at a time which coincides with union organizational activity and which treats union literature in a different manner than other employee materials constitutes a violation of Section 8(a)(1) of the Act. *Bon Marche*, 308 NLRB 184, 185 (1992).

C. *Allegations of Threats and Harassment*

1. The lunchbreak brouhaha

Officially, Dyno employees had a 35-minute lunch period. In practice, with their supervisors' knowledge and consent, they generally took an hour. In mid-December, or possibly early January, Brace left the building to have dinner with his family outside the facility. On his return, Harrison told Brace that several supervisors had noticed he had taken an excessively long lunch period. When Brace insisted on confronting his accusers, Harrison asked fellow Supervisors Winberg and Devriendt to come to his office. Winberg stated that he noticed Brace left the building at approximately 6:15 p.m. while Devriendt said he saw him return at 7:50 p.m. Brace explained to the men that he had worked more than 1-1/2 hours overtime in the past few days and since he was not compensated for this time, he took a longer than usual lunch period as permitted by company practice. When Brace was reminded that he was supposed to obtain permission in advance before taking an extended lunch period, he told them that he tried to notify Harrison, but learned he was absent from the building. One of the other supervisors then suggested that Brace could have obtained permission from someone else before leaving the building.

This exchange ended with Harrison repeating that Brace should notify someone before taking a lengthy break. However, Harrison assured him he would not be disciplined and that nothing would appear in his record about the incident. Brace added that Harrison's exact comment was that ''It is only chicken shit and all this stuff will stop after the union stuff stops.'' (Tr. 305–306.) Harrison did not recall making such a comment, but neither did he flatly deny it.

Brace testified that many employees took extended meal breaks without rebuke. Winberg stated, however, that the same evening on which Brace had been challenged, he had also cautioned two other employees about taking excessive lunch periods.

2. Brace was wrongfully harassed

Winberg's testimony does not make a compelling case that all employees were treated equally. To produce evidence that only two employees were chastised for taking excessive lunchbreaks on the very night that Brace was accused of doing the same thing does not prove that everyone was treated evenhandedly. Without more, it merely suggests that after focusing on Brace's long lunch period, the supervisors were paying unusual attention to the length of other employees' breaks on this particular occasion. In the circumstances present here, it is fair to infer that Brace's coming and goings were carefully noted because of his prominent role in the union campaign. Harrison may have forgotten telling Brace that this surveillance would cease when the union campaign ended, but a union proponent is not likely to discount such words.

Respondent makes light of this episode, suggesting that, properly analyzed, the facts simply reveal that some supervisors justifiably questioned an employee about his overly long break, but administered no discipline. I find, to the contrary, that based on all the evidence, the supervisors' handling of this matter revealed an excessive interest in Brace's

conduct which probably would not have occurred if he were not a principal union supporter.

It seems curious that two supervisors with no line responsibility for Brace's work would note his whereabouts with such attentiveness, even going to the trouble of notifying his supervisor about the length of his dinner break. When Brace explained that the time spent out of the plant was consistent with Respondent's flex-time policy, the supervisors still had to admonish him for failing to give advance notice of his mealtime intentions. In the circumstances present here, I conclude that the supervisors overreacted to Brace's extended break because of his active role as a union advocate, and thereby violated the Act.

3. Overtime and transfer rights remarks

Brace also testified that he heard Supervisor Burgess Coleman make certain threatening remarks. Thus, Brace alleged that shortly before the Christmas break, as he passed a group of people in the hallway, he overheard Coleman saying that he could not ''guarantee any raises for you guys if the union gets in.'' (Tr. 49.) Later the same day, he said he again heard Coleman telling some employees that if the UAW won, they would not have overtime and would be unable to transfer to other areas.

Coleman flatly denied making such statements. Instead, he maintained that it was an employee, Anthony Minino, who had said ''he needed to work because after the union got in the overtime would be cut out.'' (Tr. 204.) Coleman further recalled that during a general meeting, another employee, Darrin Stankowitz, commented that ''if the union gets in that the promotions and transfers would be frozen.'' In response to these comments, Coleman testified that he told the employees he didn't know what would happen if the Union prevailed and that such matters would be negotiable.

Coleman testified with certainty as to the identity of the two employees who he claimed were the true authors of the allegedly unlawful remarks. Brace, on the other hand, acknowledged that he merely overheard Coleman as he momentarily passed by in the hall. Given Coleman's certitude, I conclude that Brace must have been mistaken. At the very least, the General Counsel could have challenged Coleman's recollection by questioning the employees he named to determine if they had made the statements attributed to them. By failing to test Coleman's persuasive account of these incidents, the Government allowed Respondent's defense to prevail.

D. *The Conversion of Supplementals Was Not Unlawful*

1. The evidence

In 1991 and 1992, Respondent added a category of employee to the Dyno work force referred to as ''Supplementals.'' They were hired on either a full- or part-time basis, for a maximum of 2800 hours within a 2-year calendar period. On reaching that ceiling, they had to be terminated, but could be rehired in the next calendar year.

The salaries of supplementals, like those of regular employees, were set in accordance with their experience. Thus, while they could receive more or less than regular employees, the evidence demonstrated that on average, they earned slightly less. The real advantage for the Company was that supplementals received far fewer fringe benefits than regular employees, thereby considerably reducing labor costs.

Employee Relations Specialist Eric Dean explained that supplementals were hired to augment the regular staff during peak workload periods and to replace regular workers on leave. Once trained, they performed the same tasks and worked the same hours under the same supervision as did the regular employees. However, because they were not permanent, management believed that their departure when the workload had subsided was less disruptive than laying off regular workers.

At several meetings held in the spring and summer of 1992, regular employees voiced concerns about the number of supplementals being hired and the possibility that they would reduce the amount of overtime otherwise available. Various management officials responded to these concerns by assuring the employees that the supplementals were hired on a temporary basis and would not deprive the regular staff of overtime. Notwithstanding these assurances, between October and December 1992, Respondent converted 78 of the supplementals to regular status. On conversion, the converts received the full array of benefits available to regular employees, but their salaries remained essentially the same. The General Counsel asserts that the Respondent converted this group of employees to win their loyalty and thereby purchase their votes.

The Respondent contends that business considerations alone fueled the decision to convert the supplemental employees to regular status. Thus, Bruce Greene, a Ford management official, explained that Respondent's 1991 business plan, prepared in the latter half of the year, forecast a substantial workload increase for 1992 which would be followed by a major workload reduction for the next 4 years. These projections accompanied a directive to implement a 20-percent decrease in salary costs, causing management to conclude that the solution lay in part in adding more supplementals to the work force.

However, in the latter part of 1992, changed circumstances caused the Respondent to revise its projections. Instead of a declining workload, the Company came to anticipate just the reverse. According to Greene, the reasons underlying these revised expectations stemmed from the following factors, each of which entailed an increasing need for testing: (1) the Company determined that there were an insufficient number of testing cells and decided to expand by constructing a new wing; (2) new products were being developed; (3) the requirements of the Clean Air Act were clarified, and (4) warranty costs had to be controlled.

Recognizing that the workload would remain at high levels through 1996, Greene prepared a memo dated May 27 for higher management in which he outlined the need to convert 48 supplementals to regular status. The proposal eventually was approved following consideration over a period of months but well before the Union filed its election petition. Between October and December 15, a total of 78 supplementals, 30 more than originally approved, were converted to regular status.

2. The supplemental conversions do not offend the Act

The General Counsel contends that Respondent converted supplemental employees to regular status in order to benefit them and thereby elicit gratitude which would be reflected in

an antiunion vote in the election. To support this theory, counsel points out that Respondent converted a greater number of supplemental employees than called for in its business plan; accelerated the conversions so that they were added as regular employees prior to the election, and saved no money in the process. The problem with the General Counsel's theory is that the inference of unlawful motives he wishes to extract from Respondent's conversion efforts rests entirely on conjecture.

It is true that on conversion, former supplementals received a significant benefit in that they became entitled to the array of benefits available to all other regular employees. It also appears that some were added to the permanent staff somewhat prematurely. While management may have anticipated a need for them in the future, the rationale for adding them to the permanent work force in October and November remains elusive. However, it should be noted that at the time the conversions began in October, the election petition had not been filed. A more fundamental flaw undermines the General Counsel's case—there is not a shred of proof that anyone was influenced to vote for or against the Union by virtue of these conversions. No evidence of any sort was adduced which might have established a link between the conversions and the outcome of the election. In fact, it is just as likely that the conversion process produced a backlash among the more numerous regular employees causing them to vote for the Union, as it is to leap to the opposite conclusion. The Government must rely on more than suspicion in proving its case. It must establish by a preponderance of the evidence that the Respondent's actions in converting the supplementals to permanent status were designed to undermine a fair election. Having failed to do so, I conclude that this allegation of the complaint should be dismissed.

III. RECOMMENDED DISPOSITION OF THE REPRESENTATION CASE

As a general rule, the Board will ''set aside an election whenever an unfair labor practice occurs during the critical period.'' *Video Tape Co*., 288 NLRB 646 (1989). Here, the Union filed its election petition on November 23. Several violations of the Act which occurred prior to that date may not be taken into account under the theory that they were too remote in time to have affected the outcome of the January 1993 election. I refer, in particular, to unfair labor practices findings involving employees Stebbins and Connolly which occurred in the early fall.

In determining whether other unfair labor practices which did happen within the critical period, improperly interfered with the conduct of a fair election in this case, it is necessary to consider such factors as ''the number of violations, their severity, the extent of dissemination and other relevant factors.'' *Caron International*, 246 NLRB 1120 (1979).

Two incidents, one involving Supervisor Devriendt who insisted that Brace could not leave union literature in a nonworking area; the other dealing with excessive supervisory oversight when Brace took an overly long dinner break, could not have interfered with the employees' ability to freely select a bargaining representative. Brace, the only employee involved in both incidents, failed to state whether he had discussed his experiences with other employees. In each of these episodes, Respondent's agents acted improperly, but took no concrete adverse action. Devriendt simply told Brace not to leave union literature in the coffee room, but did not remove what was already in place. Moreover, Brace disregarded Devriendt's directive and continued to leave material there. Other supervisors took untoward interest in Brace's dinner plans, but apart from their rather close surveillance of and criticism of his conduct, no adverse action was taken. Given these considerations, I cannot conclude that these unfair labor practices, affecting only 1 employee in a unit of 329, could have had a significant impact on the outcome of the election.

The same cannot be said for all of Respondent's conduct. As discussed above, in late November, Supervisors Norris and Harrison, improperly intervened while Brace was distributing union literature in the control rooms when they were not being used as working space. It will be recalled that Brace heard Norris complain to other supervisors that he was wrongfully distributing union material. If Norris spoke so loudly that he could be heard beyond the supervisor's room, it is likely that other employees heard him as well.

Although Harrison may have spoken to Brace privately when he told him he could not distribute union literature in the control rooms, his message was nonetheless unlawful, for he restrained Brace from engaging in protected activity at times when employees were on their lunchbreaks in what was, at the time, a nonworking area. By so doing, Harrison interfered with the dissemination of information about the Union at the very place where employees were most accessible, and at a time which most favored easy communication. Thus, it is fair to infer that Harrison's intervention impinged on the employees' interest in receiving material which could lead to informed discussions of union issues.

Respondent's policy toward the appropriate use of bulletin boards was virtually nonexistent until the advent of the union campaign. Supervisors seemed to apply one standard to posting employees' personal notices on some bulletin boards allegedly dedicated to the Company's business purposes, while another standard was set for posting announcements about the Union, after the UAW campaign was underway. The double standard resulted in supervisors removing pro- and anti-union material from some boards while allowing other employee notices to remain. Dealing with literature either sympathetic or antithetical to the Union in the same manner did not legitimize Respondent's applying one policy to employee postings about the UAW and another to employee postings of a more personal nature. Any number of employees had to be aware of this double standard since supervisors stripped union literature from the bulletin boards with alacrity. Consequently, I conclude that Respondent's practices in imposing a disparate standard on employees with respect to access to certain bulletin boards had an untoward impact on the election. See *Bon Marche*, supra.

Based on the foregoing considerations, I conclude that Respondent's 8(a)(1) violations, which directly and indirectly effected a substantial number of employees in the proposed unit, sufficiently interfered with the employees ability to freely select a bargaining representative as to require setting aside the election in Case 7–RC–19940. Accordingly this matter shall be remanded to the Regional Director for Region 7 with directions to conduct a new election at an appropriate time.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(1) of the Act by maintaining an overly broad no-solicitation/no-distribution rule and implementing it disparately with respect to the distribution of union literature during nonworking times in nonworking areas, and to the posting of union literature on certain bulletin boards; by circumscribing the employees' right to engage in discussions of the Union in the facility during nonworking time; and by suggesting to an employee that wearing a union button could jeopardize his employment status.

4. The Respondent, through its supervisors' conduct, violated Section 8(a)(1) of the Act by harassing an employee about the length of his lunchbreak because he was a prominent union proponent.

5. By the various unfair labor practices found above, specifically those occurring following the filing of the petition for an election on November 23, 1992, and extending through the date of the election on January 22, 1993, Respondent has interfered with the freedom of choice of employees and it is recommended that the election in Case 9–RC–19940 be set aside and that a second election be directed.

6. Except as found above, the Respondent has not engaged in other unfair labor practices alleged in the complaint, nor has it engaged in other objectionable conduct encompassed within the Union's election objections.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(1) of the Act, I recommend that it be required to cease and desist therefrom and in any other manner interfering with, restraining, or coercing their employees in the exercise of their rights under Section 7 of the Act. Moreover, the Respondent shall be required to post an appropriate notice attached hereto as an appendix.

The recommended Order also sets aside the election held on January 22, 1993, and remands Case 7–RC–19940 to the Regional Director for Region 7 for the purpose of conducting a new election at such time as he deems that circumstances permit a free choice of bargaining representative.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Ford Motor Company, Dearborn, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining an overly broad no-solicitation/no-distribution rule and implementing it in a selective and disparate manner.

(b) Proscribing the distribution of union literature during nonworking times in nonworking areas and the posting of union literature on bulletin boards used by employees for nonwork-related purposes.

(c) Limiting employees' right to engage in discussions of union matters in the facility during nonworking times.

(d) Suggesting to employees that wearing union buttons could jeopardize their employment status.

(e) Harassing employees because they actively engage in union activities.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the above-described no-solicitation/no-distribution rule and the unlawful interpretations embodied in the conduct described in paragraphs 1(b) and (c) above and advise employees that the rule has been rescinded.

(b) Post at its facility in Dearborn, Michigan, copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT maintain an overly broad no-solicitation/no-distribution rule and WE WILL NOT implement it in a discriminatory manner.

WE WILL NOT prevent our employees from engaging in union solicitations within the facility during nonworking

times, from distribution union literature during nonworking times and in nonworking places, or from posting union material on bulletin boards that are used for other nonwork-related employee notices.

WE WILL NOT harass employees because they actively are engaged in union activities.

WE WILL NOT suggest to employees that wearing union buttons may jeopardize their employment status.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

FORD MOTOR COMPANY